IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 7TH SEPTEMBER 2007 / 16TH BHADRA 1929

WP(C).No. 24886 of 2007(K)

PETITIONER:

SUJAN AGED 45 YEARS, S/O.NARAYANAN,
PROPRIETOR, ASIATIC ASSOCIATES,
NARAYANA MANDIRAM, POONTHURA P.O.,
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.D.KISHORE

RESPONDENTS:
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1. **M/S.NARBIR SINGN & CO.,**
   GOVERNMENT CONTRACTORS, L-87, STREET NO.7-C
   MAHIPALPUR, EXTENSION, NEW DELHI-110037,
   REPRESENTED BY NARBIR SINGH AND RAJENDER SINGH,
   (RESPONDENTS 2 & 3), L-87, STREET NO.7C,
   MAHIPAPLUR, EXTENSION, NEW DELHI-110037.

2. **NARBIR SINGH AGED 45 YEARS, PARTNER,**
   M/S.NARBIR SINGH & CO., GOVERNMENT CONTRACTOR,
   L-87, STREET NO.7C, MAHIPALPUR, EXTENSION,
   NEW DELHI-110037.

3. **RAJENDER SINGH, PARTNER,**
   M/S.NARBIR SINGH & CO., GOVERNMENT CONTRACTOR,
   L-87 STREET NO.7C, MAHIPAPPUR, EXTENSION,
   NEW DELHI-110037.

4. THE ASSISTANT GENERAL MANAGER (AGM),
FINANCE & ACCOUNT, AIRPORT AUTHORITY OF INDIA,
THIRUVANANTHAPURAM INTERNATIONAL AIRPORT,
THIRUVANANTHAPURAM-695008.

BY ADV. SRI.P.PARAMESWARAN NAIR,ASST.SOLICITOR
SRI.VPK.PANICKER
SRI.A.DINESH RAO, CGC
SRI.K.L.NARASIMHAN --- R4
SRI.V.SANTHARAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 24886/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE LETTER DTD. 16/08/06 BY THE R1.

EXT.P2. COPY OF THE SHOW CAUSE NOTICE DT. 8/11/06 BY THE R1.

EXT.P3. COPY OF THE REPLY DT. 15/11/06 TO EXT. P2.

EXT.P4. COPY OF THE PLINAT IN OS NO. 383/07.

EXT.P5. COPY OF THE AFFIDAVIT AND PETITION IN IA NO. 2862/07 IN OS NO. 383/07.

EXT.P6. COPY OF THE ORDER DT. 8/6/07 IN IA NO. 2862/07 IN OS NO. 383/07 OF THE IST ADDL. SUB COURT, TVPM.

EXT.P7. COPY OF THE OBJECTION BY THE R1 TO R3. TO EXT. P5.

EXT.P8. COPY OF THE ORDER DT. 3/08/07 IN IA NO. 2862/07 IN OD 383/07 OF IST ADDL. SUB COURT, TVPM.

RESPONDENT'S EXHIBITS

EXT.R1A. COPY OF THE OFFICE ORDER NO. 1071, CIVIL OF THE GOVT. OF INDIA, DIRECTORATE GENERAL OF WORKS, CPWD CSQ, ORGANISATION, CONTRACT AND MANUAL UNIT, NIRMAN BHAVAN, NEW DELHI DT. 24/2/06.

EXT.R1B. COPY OF THE DAILY CASH BOOK MAINTAINED BY THE R1 SHOWING THE AMOUNT PAID TO THE PETITIONER.

EXT.R1C. COPY OF THE LETTER DT. 30/09/06 BY SRI. SADIQUE HUSSAIN ON BEHALF OF KGN CIVIL CONSTRATIONS.

EXT.R1D. COPY OF THE LETTER DT. 3/10/2006 TO SRI. SADIQUE HUSSAIN BY THE R1.

EXT.R1E. COPY OF THE EXTRACT OF THE BOOKS OF ACCOUNTS MAINTAINED BY R1 IN THE NAME OF SRI. SADIQUE HUSSAIN FOR THE PERIOD FROM 3/10/2006 TO 17/11/2006.

EXT.R1F. COPY OF THE EXTRACT OF THE BOOKS OF ACCOUNTS MAINTAINED BY R1 IN THE NAME OF SRI. SADIQUE HUSSAIN FOR THE PERIOD FROM 17/11/06 TO 17/6/2007.

EXT.R1G.C OP WORK SAID TO BE DONE BY THE PETITIONER UPON TO 5/11/2006, BY THE PETITIONER TO THE R1.

True copy

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M.N.KRISHNAN, J

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W.P.(C) No.24886 OF 2007

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Dated this the 7th day of September 2007

JUDGMENT

This writ petition is preferred against the order of the I Addl.Sub Court, Thiruvananthapuram in I.A.No.2862/2007 in O.S.No.383/2007. The writ petitioner is the plaintiff in the suit. He moved an application for attachment of some amount due to the defendants which lie in the hands of the Airport Authority. The court initially passed an order under Order 38 Rule 5 C.P.C. and issued show cause why he should not furnish security for the amount directed.

2. Respondents 1 and 2 entered appearance and filed counter affidavit contending that they are not liable to furnish any security. Learned counsel appearing for defendants 1 and 2 brought to my notice the first order passed by the Sub Court which reads as follows:"Heard. Perused the records. From the records, I find a prima facie case. Hence the attachment of scheduled amount. Issue notice to C.Ps. and garnishee. For return of notice and report, posted to 23.6.2007". In response to this, defendants 1 and 2 entered appearance, filed objections and the court after hearing all concerned

vacated the order and it is against that decision, the present writ petition is filed.

3. Learned counsel for respondents 1 and 2 raised a preliminary objection as to the maintainability of a writ petitiion and according to him, an appeal will lie under Order 43 Rule 1(q). Order 43 Rule 1(q) reads thus:"an order under rule 2, rule 3 or rule 6 of Order XXXVIII".

4. On the other hand, learned counsel for the writ petitioner would contend before me that this is a disposal under Order 38 Rule 5 and therefore no appeal will lie and the remedy is only to file a writ petition. In support of his contention he had cited a decision of this Court reported in ***Fiya Herbal Beauty Parlour v. Bharath Overseas Bank Ltd.(2006(3) KLT 55 SN 76),*** wherein this court held that when a petition under Order XXXVIII Rule 5 is dismissed, considering objection filed by defendant, such an order is one under Rule 5 and not under Rule 6 and appeal is not maintainable. Here, as per the order passed by the Sub Judge, an order has been passed under Order 38 Rule 5 directing attachment and thereafter objections were filed, the matter heard and disposed of. So, I am sure that it is an order passed under Order 38 Rule 6 and not under Order 38 Rule 5. In the decision reported in ***Varghese v. Varghese(2001(1) KLT 489***) this aspect has been considered, which reads as follows:"A joint reading of the

two provisions makes it clear that O.38 R.6 would come into play only pursuant to the notice issued by the court under R.5. The order contemplated in sub-r.6 is one based on the consequences of the failure of the defendants to comply with the court's directives under sub-r.5. In the instant case, the court had not passed any order under sub-r.5 and hence the impugned order rejecting the prayer for attachment can be deemed to be an order under sub-r.5 only and not under sub-r.6".

Therefore I hold that the impugned order is one passed under Order 38 Rule 6 and therefore the appeal is maintainable under Order 43 Rule 1 (q). Therefore this writ petition is dismissed as not maintainable giving opportunity to the petitioner to file an appeal under Order 43 Rule 1(q) as envisaged.

M.N.KRISHNAN, JUDGE

Cdp/-